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SECOND JUDICIAL CIRCUIT

Direct Dial: 757-385-4262

April 16, 2018

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RE: Pratibah S. Shah v. Mehul S. Shah
Case No.: CL15-3148

Dear Counsel:

This matter came before the court on defendant's Plea of the Statute of Limitations to plaintiff's Complaint, which asserts two counts for breach of fiduciary duty based upon alleged misuse of a power of attorney. After consideration of the arguments of counsel, transcript, and briefs (the last of which was filed March 28, 2018), the court finds that the plea should be sustained.

Plaintiff is the second wife of Shantilal Shah, and defendant is her stepson. Shantilal Shah executed a power of attorney naming defendant as his attorney-in-fact. Plaintiff alleges that while she "was traveling out of state in Texas" defendant used the power of attorney to deplete accounts of Shantilal Shah, remove plaintiff as a beneficiary and substitute himself, and/or moved funds out of accounts jointly held by Shantilal Shah and the plaintiff. Compl. ¶ 10. During that same time, defendant cancelled a number of credit cards that plaintiff was authorized to use. Compl. ¶ 11. The Complaint, filed July 29, 2015, sets forth no dates for any of this conduct. However, by an agreed order entered March 20, 2018, the parties stipulated that plaintiff was in Texas from July 10, 2013 through July 17, 2013. Other than this stipulated time frame, the parties have presented no testimony or evidence relevant to the application of the statute of limitations. The parties further agreed that the applicable statute of limitations is two years, but dispute when the cause of action for breach of fiduciary duty accrued, with plaintiff asserting that it did not accrue until she

discovered the breach. Plaintiff also asserts that there is essentially a "rolling" date of accrual for continuous tortious conduct, which she alleges was committed by defendant.

Defendant bears the burden of proving plaintiff's action is time barred since he is the one bringing the plea in bar. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 117 (2008). Since no testimony or evidence was presented, the court can only consider the pleadings, taking plaintiff's allegations as true, as well as considering any facts stipulated to by the parties. *Lostrangio v. Laingford*, 261 Va. 495, 497 (2001); *David White Crane Serv. v. Howell*, 282 Va. 323, 326 (2011). Both parties have attempted to have the court consider or take judicial notice of pleadings in other cases in this court involving these parties. However, consistent with the above rules, the court cannot take cognizance of the contents of other files, except to the extent those matters have been offered and admitted as evidence.[1] *Bernau v. Nealon*, 219 Va. 1039, 1043 (1979); *Taylor v. Commonwealth*, 28 Va. App. 1, 8 (1998) (citations omitted). Here, only excerpts from the pleadings in CL15-1759 were received into evidence, and they only established the dates that plaintiff was in Texas.

Plaintiff first argues that the actions of defendant in misuse of the power of attorney constitute a "continuing" tort, asserting that financial transactions harmful to plaintiff continued for months after the week of July 10, 2013. Pl.'s Mem. in Opp'n at 3. In making this argument, plaintiff relies upon *Hampton Rds. Sanitation Dist, v, McDonnell*, 234 Va. 235, 239 (1987), for the proposition that for episodic wrongful acts, each inflicting new injuries, the limitation period applies separately to each act. However, the Complaint does not allege any facts showing episodic wrongful acts occurring after the week of July 10, 2013. Nor does it provide a basis for inferring such facts, even reading its allegations most favorably to plaintiff. No *evidence* (as opposed to argument by counsel) was presented at the hearing establishing such ongoing conduct, so the court cannot consider that as a basis for finding that the suit was timely filed.

As a result, the Complaint on its face shows that the statute of limitations had expired when this matter was filed, as it alleges wrongful conduct occurring no later than July 17, 2013, and was not filed until July 29, 2015. Consequently, the burden shifts to plaintiff to establish some basis for avoiding the bar of the expiration of the limitations period. *See, e.g., Schmidt*, 276 Va. at 117. Plaintiff seeks to do that by asserting that the discovery rule applies to claims for breach of fiduciary duty. She also asserts on brief that defendant concealed the existence of the cause of action by changing the address of record on the accounts that he closed, withdrew funds from, and/or changed the beneficiaries on, so that notices reflecting those changes did not reach her and Shantilal Shah. Pl.'s Mem. at 4-5 (citing § 8.01-229(D)(ii)). However, the Complaint neither alleges that the defendant changed the address on the accounts nor provides a basis for inferring that, and no

[1] The court notes that if it *could* consider those pleadings, plaintiff's sworn answer in Mehuh S. Shah v. Shantilah N. Shah and Pratibha S. Shah, CL13-4828, indicates that plaintiff knew no later than Sept. 24, 2013 that defendant had committed much of the activity alleged herein.

evidence of that change was presented, so the court cannot consider that as a basis for overruling the plea in bar.

That leaves only the potential application of the "discovery rule" – i.e., that the cause of action did not accrue until plaintiff discovered the breach of fiduciary duty – as a means for plaintiff to overcome the plea in bar.[2] The general rule for accrual of causes of action is provided by § 8.01-230, namely "the date the injury is sustained in the case of injury to the person or damage to property, [or] when the breach of contract occurs . . . and not when the resulting damage is discovered." There are statutory exceptions to this cross-referenced in § 8.01-230, such as the discovery rule for fraud, mistake, or misrepresentation contained in § 8.01-249(1). A claim for breach of fiduciary duty falls under the two year "catch-all" provisions of § 8.01-248, and there are no statutory provisions exempting it from the accrual rule of § 8.01-230.

There are no Virginia Supreme Court cases applying the discovery rule to a breach of fiduciary duty claim. Rather, "'statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application.'" *Casey v. Merck & Co.*, 283 Va. 411, 416 (2012) (citations omitted). Thus, "'an exception applied, in the absence of a clear statutory enactment to such effect . . . doubt must be resolved in favor of the enforcement of the statute.'" *Id.* (citations omitted). Plaintiff relies upon persuasive authority provided by *Int'l Surplus Lines Ins. Co. v. Marsh & McLennan, Inc.*, 838 F.2d 124, 128 (4th Cir. 1988), which held that accrual occurs upon the discovery of the breach of fiduciary duty. However, that precedent is of doubtful validity, for in reaching that holding the court cited upon § 8.01-249(1), which sets forth the discovery rule for fraud and misrepresentation, not breach of fiduciary duty. This citation also may have resulted from the fact that the plaintiff alleged that the defendant breached its fiduciary duty by making fraudulent misrepresentations. *Id.* at 126.

Beyond that, this holding of *Int'l Surplus Lines* has been roundly rejected by more recently decided state and federal cases. *See, e.g., Goldstein v. Malcolm G. Fries & Assocs.*, 72 F. Supp. 2d 620, 626 n.4 (E.D. Va. 1999) (refusing to apply *Int'l Surplus Lines* after a review of recent Virginia circuit court cases); *Jones v. Shooshan*, 855 F. Supp. 2d 594, 602-03 (E.D. Va. 2012) (noting that since *Int'l Surplus Lines*, "Virginia courts have repudiated the discovery rule for breach of fiduciary duty claims, and the majority of the federal courts in Virginia have followed suit," citing eight cases in support and only one contrary). The analysis of *Colgate v. Disthene Grp., Inc.* is particularly apt, as it held that "the Supreme Court of Virginia would be unlikely to apply the discovery rule to a claim of a breach of fiduciary duty," since it is "mindful of the separation of powers and would be loath to add a cause of action to the provisions of Code § 8.01-249 where the legislature has not seen fit expressly to include [it]." 86 Va. Cir. 218, 227-28 (Buckingham County 2013).

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[2] Even if the discovery rule applies, no specific *date* of discovery has been provided, other than some time after Shantilal Shah revoked the power of attorney he granted the defendant. Pl.'s Mem. at 5.

Other persuasive authority relied upon by plaintiff to support application of the discovery rule to her claims are distinguishable. First, she cites *Parsch v. Massey*, 72 Va. Cir. 121 (Charlottesville 2006), for the proposition that where the facts are "close to that of fraud" the discovery rule is applied. However, in *Parsch* fraud was actually alleged and a claim asserted for it, and the court noted that "the claim for breach of fiduciary duty is inextricably bound up with the fraud claim." *Id.* at 122, 123-24. There are no allegations of the elements of fraud or of misrepresentations in this matter. *Langdon v. Dougherty*, 2005 Va. Cir. LEXIS 305 (Alexandria 2005) is distinguishable on the same basis. Plaintiff cites it for the proposition that a cause of action for breach of fiduciary duty only accrued when false accountings were confirmed. Again, fraud and misrepresentation were actually alleged in that matter, resulting in a count for fraud. Langdon also asserted a claim to surcharge or falsify accounts of an executor and trustee for fraudulently omitting acts of self-dealing. *Id.* at *2. As with *Parsch*, the court applied a discovery rule to claims for breach of fiduciary duty, because "said breach is so intricately intertwined with his transgressions under [the surcharge/falsify count]." *Id.* at *24. Additionally, that statement is *dicta* as the court stated that because of the intertwining, "the Court need not separately address this Count [for breach of fiduciary duty] other than to note that the statute of limitations for the breach of fiduciary duty is the shortest and, therefore, would not result in maximum recovery by the Complainants." *Id.* Finally, plaintiff's reliance on *Smith v. Sullivan*, 92 Va. Cir. 182 (Chesapeake 2015) is misplaced, as the court there applied the discovery rule to a breach of fiduciary duty claim between partners due to rules uniquely applicable to partnerships. This matter does not involve a partnership.

The court finds that the accrual rule of § 8.01-230 applies to the claims herein, not a discovery rule. As discussed above, given the procedural posture of this matter, the court can only consider the allegations of plaintiff's Complaint, and the parties' stipulation of fact contained in the March 20, 2018 order, in resolving the plea of the statute of limitations. On that basis, the court finds that plaintiff had until July 17, 2015 at the latest to bring her claims. Since she did not file her Complaint until July 29, 2015, this action is time barred and defendant's plea is sustained. Mr. Wilson is asked to prepare an order consistent with the court's ruling.

Very truly yours,

William R. O'Brien

WRO:ahj:dls